Howell Integrated Title Data Sys. v. Dulaney, 800 S.W.2d 336 (Tex.App.--El Paso 1990, no writ)

Leong v. Wright, 478 S.W.2d 839 (Tex.App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.)

Miller v. Wal-Mart Stores, Inc., 918 S.W.2d 658 (Tex.App.--Amarillo 1996, writ denied)

Ohio Med. Prods., Inc. v. Suber, 758 S.W.2d 870 (Tex. App.--Houston [14th Dist.] 1988, writ denied)

Realtex Corp. v. Tyler, 627 S.W.2d 441 (Tex.App.--Houston [1st Dist.] 1981, no writ)

Sosa v. City of Corpus Christi, 739 S.W.2d 397 (Tex.App.--Corpus Christi 1987, no writ)

State Bar v. Kilpatrick, 874 S.W.2d 656 (Tex.1994)

Stephenson, 16 S.W.3d at 839

Tex. Att'y Gen. Op. No. JC-0211 (2000)

Tuck v. Tuck, 509 S.W.2d 656 (Tex.App.--Austin 1974, writ ref'd n.r.e.)

Whatley v. City of Dallas, 758 S.W.2d 301 (Tex.App.--Dallas 1988, writ denied)

White v. Sullins, 917 S.W.2d 158 (Tex.App.--Beaumont 1996, writ denied)

William Chu v. Chong Hui Hong, 2005 LEXIS 8767 (Tex. App.–Fort Worth) (unreported case):

Cause No. 2-04-279-CV

Statutes

FEDERAL STATUTES

28 U.S.C. 1254(1)
28 U.S.C. 1257(a)
9 (a) of the Hatch Act, 5 U.S.C. 7324 (a) (2)

STATE STATUTES

Tex. Disciplinary R. Prof'l Conduct
Rule 8.04(a) (1), (2), and (3)
Rule 1.03(a)
Rule 1.14(b)
Rule 4.01
Rule 8.04(a)
Rule 8.04(a)(3)
Rule 8.04(a)(1)
Rule 8.04(a)(8)
Rules 1.14(b), 4.01. 8.04(a)(1), and 8.04(a)(8)
Rules 4.01(a) and 8.04(a)
Rules 4.01 and 8.04(a)
Rule 3.01
Rule 3.01(D)
Rule 3.01(E)
Rule 3.01(G)
Rule 3.09
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Texas Rules of Civil Procedure

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Rule 3.01.
(Disciplinary Petition)
Rules 3.01. 3.05, 3.08. 3.09, 3.10
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See Rule 3.08.B

Constitutional Provisions

U.S. Const. amends. I, V
U.S. Const. amends. I, V
U.S. Const. amends. V
U.S. Const. art. VI
Article I, Sec. 1 *(Supremacy Clause)*
Article I, Sec. 8

Article I, Sec. 8 *(Bill of Rights Freedom of Expression Clause)*
Article I, Sec. 19
Article I, Sec. 19 *(Substantive and Procedural Due Process Clause)*
Article I, Sec. 29 *(Bill of Rights Excepted from Powers of Government Clause)*

Article VI, Clause III *(Oath of Office and National Duties of State Officers)*
Article VI, Clause II, *(Supremacy of the Constitution and Laws, and National Duties of State Officers of the Court)*
Article XVI, Sec. 1(a)
Article XVI, Sec. 1(a) *(Oath of Office and National Duties of State Officers)*

Tex. Const. art. I 1, 8, 19, and 29
Tex. Const. art. I 1, 19, and 29
Tex. Const. art. I 1, 8, 19, and 29
Tex. Const. art. XVI 1(a)

PETITION FOR A WRIT OF CERTIORARI

Bryan Lee Walter respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas and the Court of Appeals for the Fifth District of Texas in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth District of Texas sent to opinion reporter service, has not been recorded with the clerk as published, but has been retrieved as 2005 Tex. App. LEXIS 3432. 1a. The Supreme Court of Texas' order denying the petition for review is unpublished. App. 86a. The opinion of the 401st District Court of Collin County Texas is also unpublished. App. 51a.

JURISDICTION

The judgment of the Fifth District was entered May 5, 2005. On December 2, 2005, the state supreme court issued an order denying a timely filed petition for review. App. 86a. On January 5, 2006, the court of appeals issued an order for mandate. App. 86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution:
   - A. Article VI, Clause III *(Oath of Office and National Duties of State Officers)*;
   - B. First Amendment, *Freedom of Expression Clause*;

C. Fourteenth Amendment, Section 1 *(Substantive Due Process and Civil Procedural Due Process Clauses)*;

D. Fifth Amendment, *Substantive and Procedural Due Process Clauses*; and

E. Article VI, Clause II, *(Supremacy of the Constitution and Laws, and National Duties of State Officers of the Court)*.

2. The Texas Constitution:

A. Article I, Sec. 1 *(Supremacy Clause)*;

B. Article I, Sec. 29 *(Bill of Rights Excepted from Powers of Government Clause)*;

C. Article XVI, Sec. 1(a) *(Oath of Office and National Duties of State Officers)*;

D. Article I, Sec. 8 *(Bill of Rights Freedom of Expression Clause)*; and

E. Article I, Sec. 19 *(Substantive and Procedural Due Process Clause)*.

3. Texas Rules of Civil Procedure, Rule 63, 66, 67, 262, 269(a), 270, 275, 277, 279, 300, and 301.

4. Texas Rules of Disciplinary Procedure Rules 3.01, 3.08, 3.09, and 3.10.

5. Texas Disciplinary Rules of Professional Conduct Rules 1.14(b), 4.01, 8.04(a)(1), and 8.04(a)(8), and "Preamble: Scope."

6. Other relevant statutes and regulations are set out in the appendix.

STATEMENT

This case concerns a challenge to the Texas Rules of Disciplinary Procedure, the triers of fact, and the proceedings of the trial, appellate, and state supreme court as follows:

Construction of Rule 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct violated Petitioner's rights to:

1. freedom of speech under the First Amendment of the United States Constitution and Article I, Sec. 8 of the Texas Constitution; and

2. substantive, civil procedural, and procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution, Article I, Sec. 19 of the Texas Constitution, and Code Construction Act, Government Code Chapter 311.

The triers of fact in the trial, appellate, and state supreme court proceedings violated Petitioner's rights to substantive, civil procedural, and procedural due process under the Fifth and Fourteenth Amendments of The United States Constitution, Article I, Sec. 19 of the Texas Constitution, Code Construction Act, Government Code Chapter 311, Texas Rules of Civil Procedure Rules 262, 269(a), 270, 275, 300, and 301, Texas Rules of Disciplinary Procedure Rules 3.01, 3.08, 3.09, 3.10, and the *Preamble: Scope* of the Texas Disciplinary Rules of Professional Conduct.

The triers of fact in the trial, appellate, and state supreme court proceedings violated Petitioner's expectation of the aforementioned violated rights, in that they were bound by Oath or Affirmation and under the Constitution, and the Laws

of the United States to support, preserve, protect, and defend the United States Constitution under Article VI of the United States Constitution, Article XVI, Sec. 1(a) of the Texas Constitution.

Petitioner is an attorney licensed by the state of Texas, whose daughter was kidnaped, leading to the issuance of a writ of attachment for her to be picked up by any sheriff or constable in Texas. In an attempt to locate Petitioner's daughter for a sheriff to execute the writ of attachment, Petitioner's wife called the mother's attorney (Schattman), identifying herself as Schattman's client, to find out when the mother had an appointment, so that a sheriff could pick up the child. Schattman filed a grievance against Petitioner accusing Petitioner of dishonesty, even though Petitioner was acting in his capacity as a parent and a private citizen, rather than as an attorney, and despite the fact that Petitioner was represented by another attorney in the case. Although the trial judge in the custody case said he did not blame Petitioner, and in fact, would have done the same or worse himself, if it had been his daughter, the State Bar of Texas filed a grievance against Petitioner for dishonesty. Schattman's client's parental rights were ultimately terminated, but Petitioner was suspended from practicing law.

A. Trial Court Proceeding

On June 18, 2002, Respondent filed its Disciplinary Petition. On October 7, 2002, Respondent filed its first amended disciplinary petition. On March 3, 2003, an order for bifurcation was signed. The state trial court held trial March 31, 2003. On April 7, 2003, Respondent filed its motion for leave to file trial amendment for its first amended disciplinary petition, with an objection filed by Petitioner on April 8, 2003. The state trial court granted Respondent's request for the trial

amendment April 11, 2003. On June 30, 2003, the state trial court conducted the punishment phase of the bifurcated trial. On July 21, 2003, Respondent filed its motion for leave to file second trial amendment to the first amended disciplinary petition, with Petitioner filing objections in his brief on July 25, 2003. The state trial court granted Respondent's request for the second trial amendment July 16, 2005. On September 8, 2003, the court signed orders that on March 30, 2003 it held trial and on June 30 conducted the punishment phase, with the following conclusions in its judgment: regarding the Rasor complaint, Petitioner violated Texas Disciplinary Rules of Professional Conduct Rule 1.14(b); the Schattman complaint, Petitioner violated Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(3). Based upon those conclusions, the trial court determined that Petitioner's conduct engaged in was found to have violated Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(1) defined by Texas Rules of Disciplinary Rules Rule 1.06Q.

Petitioner was not fairly put on notice on the theory of the case and/or evidence intended used to assert said theory not reflected in the trial amendment. As factually pleaded in the first amended disciplinary petition, Petitioner demonstrated allegations concerning the April 2000 deposit, receipt, and distribution of funds were false. Respondent prior to trial did not file a trial amendment or at the time of trial did not motion, request or offer a trial amendment.

During trial Respondent, over objection, was permitted to interrogate Petitioner on one aspect of the Rasor count concerning the disbursement of funds which Petitioner objected to as beyond the scope of the pleadings. The trial court stated, in overruling the objection, that the matter had already been tried by implied consent.

After the close of the evidence on June 30, 2003, Respondent on July 16, 2003 tendered a trial amendment and a Motion for Leave to file said trial amendment. Petitioner filed an objection and opposition to the granting of the leave and the acceptance of the trial amendment. Respondent changed their theory after they rested, without calling Petitioner to the stand and during Respondent's cross-examination of Petitioner during the defense case. Because Respondent never prior to trial filed a trial amendment or at the time of trial did not motion, request or offer a trial amendment, Petitioner was not allowed to assert surprise or offer any evidence relative to Respondent's changed theory.

B. Apellate Proceeding

Petitioner appealed the trial court's judgment. Petitioner raised the following issues: (1) the trial court erred by applying Disciplinary Rule of Professional Conduct 8.04(a)(3) to conduct in his private life; (2) Rule 8.04(a)(3) is unconstitutional; (3) evidence was legally and factually insufficient to support the trial court's determinations regarding certain complaints; and (4) the trial court erred by allowing the Commission for Lawyer Discipline to amend its petition during trial.

C. State Supreme Court Proceeding

Petitioner after the appellate court affirmed the trial court's judgment timely filed a proceeding with the Supreme Court of Texas for a petition for review of the appellate court on July 21, 2005, following a motion to extend time. The Supreme Court of Texas on December 2, 2005 dismissed the petition without opinion, sending notice to the appellate court. The appellate court issued its mandate.

UNIQUENESS OF DISCIPLINARY PROCEEDINGS

Pursuant to Texas Rules of Disciplinary Procedure Rule 3.08 disciplinary proceedings are governed by the Texas Rules of Civil Procedure, except as varied by the Texas Rules of Disciplinary Procedure. Thus, in a disciplinary proceeding, Respondent has a heightened pleading requirement, i.e., the duty of a higher standard of pleading of a petition imposed under Rule 3.01, styled "Disciplinary Petition." Respondent had the duty to plead with specificity the specific Disciplinary Rules alleged violated and the conduct alleged to have violated them. *Howell v. State*, 559 S.W.2d 432, 434-435 (Tex. Civ. App. -- Tyler 1977, writ ref'd n.r.e.). It is against this background of the law controlling the trial of Disciplinary Actions that the state proceedings should be considered in this petition.

DUE PROCESS VIOLATIONS

A. Procedural Violations of Fair Trial

Petitioner contends that the construction of Rule 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct violated Petitioners rights as follows:

1. freedom of speech under the First Amendment of the United States Constitution and Article I, Sec. 8 of the Texas Constitution; and

2. substantive, civil procedural, and procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution, Article I, Sec. 19 of the Texas Constitution, and Code Construction Act, Government Code Chapter 311.

Petitioner contends that the triers of fact and proceedings of the trial, appellate, and state supreme court involving this case before the bar violated Petitioner's rights to substantive, civil procedural, and procedural due process under the Fifth and Fourteenth Amendments of The United States Constitution, Article I, Sec. 19 of the Texas Constitution, Code Construction Act, Government Code Chapter 311, Texas Rules of Civil Procedure Rules 63, 66, 67, 262, 269(a), 270, 275, 277, 279, 300, and 301, Texas Rules of Disciplinary Procedure Rules 3.01, 3.08, 3.09, 3.10, and the *Preamble: Scope* of the Texas Disciplinary Rules of Professional Conduct

Petitioner contends that the triers of fact of the trial, appellate, and state supreme court proceedings violated Petitioner's expectation of the aforementioned violated rights, in that the triers of fact were bound by Oath or Affirmation and under the Constitution, and the Laws of the United States to support, preserve, protect, and defend the United States Constitution under Article VI of the United States Constitution, Article XVI, Sec. 1(a) of the Texas Constitution,

B. Failure to Comply with Texas Rules of Disciplinary Procedure Rule 3.01 Violated Due Process

Texas Rules of Disciplinary Procedure Rule 3.01. (*Disciplinary Petition*) sets forth pleading requirements, and specific items that the petition "must contain," and specifically imposes a duty of a heightened pleading requirement. *See Swierkiewicz*, 534 U.S. at 513 (specific statute imposes a heightened factual specificity in pleading). Thus, to provide Petitioner procedural due process the disciplinary petition was required to contain:

1. "A description of the acts and conduct that gave rise to the alleged professional Misconduct in detail sufficient

to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts." Rule 3.01(D);

2. "The specific rules of the Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions." Rule 3.01(E); and

3. "Any other matter that is required or may be permitted by law or by these rules." Rule 3.01(G).

The trial amendments failed to comply with Texas Rules of Disciplinary Procedure Rule 3.01, by changing the theory of the case and the allegations, without providing proper notice to Petitioner. Respondent's trial amendments failed to meet the heightened notice of specificity standard, or even the lower duty of fair notice standard, as they occurred at the close of evidence and after the trial ended. See *Erisman v. Thompson*, 167 S.W.2d 731, 733 (Tex. 1943) (pleadings define the lawsuit and determine the issues for trial); *Crain v. San Jacinto Sav. Ass'n*, 781 S.W.2d 638, 639 (Tex.App.--Houston [14th Sist.] 1989, writ dism'd) (pleadings give notice of evidence to be introduced).

Respondent tendered its first trial amendment on April 7, 2003, after evidence closed and the trial concluded March 31, 2003. Petitioner filed an objection and opposition to the granting of the leave and the acceptance of the trial amendment. On April 8, 2003, the trial court granted Respondent's request, and allowed the first trial amendment. On July 21, 2003, Respondent tendered a second trial amendment, and a Motion for Leave to file said second trial amendment. Petitioner filed an objection in his trial brief in response to the second trial amendment. Respondent changed its theory after resting,

without calling Petitioner to the stand, and during Respondent's cross-examination of Petitioner during the defense case. Because Respondent never prior to trial filed a trial amendment or at the time of trial did not motion, request or offer a trial amendment, Petitioner was not allowed to assert surprise or offer any evidence relative to Respondent's changed theory.

The state trial court erred in granting Respondent leave to file trial amendments after the close of evidence and after trial. After the close of evidence, it is too late to ask to amend the pleadings to add new theory. *White v. Sullins,* 917 S.W.2d 158, 161 (Tex.App.--Beaumont 1996, writ denied); *Tuck v. Tuck,* 509 S.W.2d 656, 657-58 (Tex.App.--Austin 1974, writ ref'd n.r.e.), *Burroughs Corp. v. Farmers Dairies,* 538 S.W.2d 809, 811 (Tex.App.--El Paso 1976, writ ref d n.r.e.).

If the nonmovant does not have a chance to introduce evidence in response to the amendment, the court abuses its discretion in permitting the amendment. *See Douglas v. Owens,* 50 F.3d 1226, 1236-37 (3d Cir. 1995). The appellate court will reverse the district court's ruling on a motion to amend pleadings only if the district court abused its discretion. *Orix Credit Alliance,* 125 F.3d at 480; *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1064 (8th Cir. 1997); *Triad Elec. & Controls, Inc. v. Power Sys. Eng'g, Inc.,* 117 F.3d 180, 192 (5th *Cir. 1997); Atchinson v. District of Columbia,* 73 F.3d 418, 426 (D.C. Cir. 1996); *Security Ins. Co. v. Kevin Tucker* & Assocs., 64 F.3d 1001, 1008 (6th Cir. 1995).

Both the state appellate and supreme court likewise erred in failing to conduct a review of the lower proceedings. Petitioner raised the issue of the amendments before both courts, that motions for leave to file amendments were granted and the amendments were filed after close of evidence and after trial, and petitioner did not have a chance to enter evidence in

response to the amendments. The state appellate court erred by not ruling on the amendments being permitted to be filed, and the state supreme court, altogether conducted no hearing or made ruling on this one issue alone.

Respondent offered its evidence not fully developed and was relevant to both a pleaded and an unpleaded matter, see *U.S. v. Ideal Elec. Sec. Co.*, 81 F.3d 240, 247 (D.C. Cir. 1996); *Douglas*, 50 F.3d at 1235-36; *DCPB, Inc.*, 957 F2d at 917. Because of the volume of information that Respondent sought in discovery and introduced, Petitioner did not contest the introduction of evidence because the party did not recognize the significance of the evidence, see *Domar Ocean Transp., Ltd. v. Independent Ref. Co.*, 783 F.2d 1185, 1188 (5th Cir. 1986); If the court accepts an oral amendment and the other party does not object before the case is submitted to the jury, the error is waived. TRAP 33.1; *Zimlich*, 29 S.W.3d at 73.

The second trial amendment violates Texas Rules of Disciplinary Procedure Rule 3.01 by changing the change in the theory of the case as to the allegations that changed without providing fair notice to Petitioner as it occurred in the middle of the trial, after Respondent had rested.

The state trial court during the March 31, 2003 trial said that it believed that issues related to the post-trial amendments had been tried by consent; however the court never formally ruled that trial by consent had occurred. Even when some evidence is introduced on an unpleaded issue, a party is not always entitled to amend its pleading. When a party introduces some evidence on an unpleaded issue but does not develop it, the party is not entitled to amend its pleadings to add the unpleaded issue. *Whatley v. City of Dallas*, 758 S.W.2d 301, 306-07 (Tex.App.--Dallas 1988, writ denied); *Realtex Corp. v. Tyler*, 627 S.W.2d 441, 443-44 (Tex.App.--Houston [1st Dist.]

1981, no writ). When a party introduces evidence that is relevant to both pleaded and unpleaded issues, the party is not entitled to amend its pleadings to add the unpleaded issue. *See Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex.1993); *Integrated Title Data Sys. v. Dulaney*, 800 S.W.2d 336, 339 (Tex.App.--El Paso 1990, no writ); *Harrison v. City of San Antonio*, 695 S.W.2d 271, 278 (Tex.App.--San Antonio 1985, no writ).

Trial amendments are not permitted when evidence comes in without objection but the issue was not developed or adding substantive matter when the facts were known to the party ahead of time. *Whatley v. City of Dallas*, 758 S.W.2d 301, 307 (Tex.App.--Dallas 1988, writ denied), *Sosa v. City of Corpus Christi*, 739 S.W.2d 397, 400 (Tex.App.--Corpus Christi 1987, no writ), *Miller v. Wal-Mart Stores, Inc.*, 918 S.W.2d 658, 666 (Tex.App.--Amarillo 1996, writ denied), *Leong v. Wright*, 478 S.W.2d 839, 846-47 (Tex.App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.).

The motion for leave to amend pleadings may be dictated into the record. In the motion, the party should state why the amendment is appropriate and necessary. The amended pleading should be in writing, signed by the attorney or the party, and tendered to the court for filing. TRCP 45(d), 63; *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 73 (Tex. 2000) (must be in writing); *see Hunt v. Baldwin*, 68 S.W.3d 117, 134-35 (Tex.App.--Houston [14th Dist.] 2001, no pet.) (record must reflect that written trial amendment was offered). If the court accepts an oral amendment and the other party does not object before the case is submitted to the jury, the error is waived. TRAP 33.1; *Zimlich*, 29 S.W.3d at 73. Respondent had opportunity at trial to make an oral request and failed to do so, in fact, Respondent waited until a week after trial before filing its motion for leave to file trial amendment on April 7, 2003. Respondent failed to exercise due diligence in their motion for

leave to file their trial amendment, see *Ohio Med.*, 758 S.W.2d at 872.

When the district court bases its decision to deny leave to amend on a legal conclusion that the amended pleading would not withstand a motion to dismiss, that decision may be reviewed de novo. *Fisher v. Roberts,* 125 F.3d 974, 977 (6th Cir. 1997). Whether an amendment is appropriate is a function of three factors: the nature of the amendment, the evidence introduced at trial, and timeliness.

If the amendment made a substantive change and altered the nature of the trial itself, the trial court had the discretion to grant or deny leave to amend. *Chapin,* 844 S.W.2d at 665; see, e.g., *Hardin v. Hardin,* 597 S.W.2d 347, 349-50 (Tex.1980) (court had discretion to deny amendment offered on day of trial to add affirmative defenses). On appeal, an appellant who objected to the amendment must show (1) surprise or prejudice, or (2) that the amendment asserted a new cause of action or defense, and thus was prejudicial on its face. *State Bar v. Kilpatrick,* 874 S.W.2d 656, 658 (Tex.1994); *Chapin,* 844 S.W.2d at 665; *Stephenson,* 16 S.W.3d at 839.

All pleadings must be construed to do substantial justice. *Almand v. DeKalb Cty.*, 103 F.3d 1510, 1514 (11th Cir. 1997). Therefore, appellate courts will review de novo a district court's ruling to regarding a case due to the form or content of a pleading. *See Yamaguchi v. U.S. Dept. of the Air Force,* 109 F.3d 1475, 1480-81 (9th Cir. 1997) (dismissal for failure to state a claim); *Cinton v. Union Pac. R.R.*, 813 F.2d 917, 919-20 (9th Cir. 1987) (dismissal for failure to comply with local rules regarding form of complaint).

Disciplinary actions, lawsuits such as this, are creatures of statute. While generally governed by the Texas Rules of

Civil Procedure, that is true only to the extent not in conflict with the Texas Rules of Disciplinary Procedure. See Rule 3.08.B, T.R.D.P., "Except as varied by these rules, the Texas Rules of Disciplinary Procedure apply." Petitioner raises this point to make an important point concerning the proper method of analysis of the evidence in a disciplinary action.

Pursuant to Rule 3.09, T.R.D.P., the trial court's case was not one which can be considered like an ordinary civil case in that a general verdict is not permitted. In other words, the trier of fact must first find facts, then the trier or law must determine if those facts constitute each and every element of any of the Disciplinary Rules which have been pleaded as violated. If and only if the facts found supply, by a preponderance, the evidence to find that each and every element of a pleaded Disciplinary Rule has been proven, can a lawyer be found to have committed professional misconduct. See also, Rule 1.06.Q, T.R.D.P. for the definition of professional misconduct. This analysis is consistent with the holding in *Howell v. State*, 559 S.W.2d 432, 434-435 (Tex. Civ. App. -- Tyler 1977, writ ref'd n.r.e.), which construed a predecessor to the current Rule 3.09. In *Howell*, the disciplinary action was tried to a jury and the jury, rather than being given jury questions (then special issues) to determine facts, was given the ultimate question of professional misconduct by having the Disciplinary Rule submitted to them in the special issue. "Did the Respondent engage in conduct prejudicial to the administration of justice?" The jury answered in the negative and the judge granted a JNOV for the Petitioner. The Court of Appeals determined that was appropriate as the function of the trier of fact was to determine facts and the function of the trier of law was to determine if the facts found constituted a violation of a Disciplinary Rule. In other words, whether professional misconduct was committed is a question of law which is decided on the basis of the facts found. Before the "as

a matter of law" determination can be made, specific facts must be found, not merely a purported "finding of fact" which is really the answer to the ultimate question of law.

In the Schattman complaint, the trial court erred in failing to apply a rule of reason approach to the allegations of misconduct, petitioner's behavior was reasonable under the circumstances and demonstrated that the trial judge in the custody case was aware of his conduct and, when sanction was sought by the opponent acting through Ms. Schattman, the court refused to sanction Petitioner. Since Petitioner established in the trial of this case that he was not acting as an attorney when the undisputed conduct occurred, it is unreasonable to sanction him in this matter or, alternatively, it is unconstitutional to use the Disciplinary Rules to sanction such conduct which was not undertaken in the capacity of attorney at law and/or unconstitutional to use the Disciplinary Rules to make improper conduct which would not be improper if engaged in by a lay person when the attorney is not acting as an attorney.

As to Rasor complaint, the court erred in permitting a trial amendment, over objection, after the evidence had closed, which asserted a new cause of action against Petitioner.

This case is similar to one previously before this court, in which the use of trial amendments after close of evidence was held to be a lack of notice and a denial of due process. In *In Re Ruffalo*, 390 U.S. 544 (1968), the state court proceedings, originally charged petitioner with 12 counts of misconduct. Charges 4 and 5 accused petitioner of soliciting FELA plaintiffs as clients through an agent, Michael Orlando. At the following hearings, both Orlando and petitioner testified that Orlando did not solicit clients for petitioner but merely investigated FELA cases for him, where some of Orlando's investigations involved

cases where his employer, the Baltimore & Ohio Railroad, was defendant. Immediately after hearing this testimony, the Board, on the third day of hearings, added charge 13 against petitioner based on his hiring Orlando to investigate Orlando's own employer.

The State Board found petitioner guilty of seven counts of misconduct, including No. 13. On review, the Supreme Court of Ohio found the evidence sufficient to sustain only two charges, one of them being No. 13, but concluded that the two violations required disbarment. The only charge on which the Court of Appeals acted was No. 13

Charge 13 for which petitioner stands disbarred was not in the original charges made against him, only after both him and Orlando had testified, this additional charge was added. Thereafter, no additional evidence against petitioner relating to charge 13 was taken. Rather, counsel for the county bar association said: "We will stipulate that as far as we are concerned, the only facts that we will introduce in support of Specification No. 13 are the statements that Mr. Ruffalo has made here in open court and the testimony of Mike Orlando from the witness stand. Those are the only facts we have to support this Specification No. 13."

In *In re Ruffalo* this Court held that the lack of notice to petitioner deprived petitioner of procedural due process and that a lawyer charged with misconduct in a bar proceeding is entitled to procedural due process, which includes fair notice of the charge.

Failure to comply with the heightened pleading of Texas Rules of Disciplinary Procedure Rule 3.01 was an absence of fair notice and the precise nature of the charges violated Petitioner of substantive, civil procedural, and procedural due

process under the Fifth and Fourteenth Amendments of the United States Constitution, Article I, Sec. 19 of the Texas Constitution, Code Construction Act, Government Code Chapter 311, Texas Rules of Civil Procedure Rules 262, 269(a), 270, 275, 300, and 301, Texas Rules of Disciplinary Procedure Rules 3.01, 3.08, 3.09, 3.10, and the *Preamble: Scope* of the Texas Disciplinary Rules of Professional Conduct.

Finally, pursuant to Texas Disciplinary Rules of Professional Conduct, the Court did not assess appropriate discipline on a "violation-by-violation.".

C. The State Proceedings Permitting Trial Amendments Violated Texas Rules of Civil Procedure Rules 63, 66, 67. 269(a), 270, 275, 277, 279, 300, and 301

As a general rule, a court should permit a party to amend its pleadings unless the court finds that (1) the party is guilty of undue delay, bad faith, or dilatory motive; (2) the party has failed repeatedly to cure pleading deficiencies by amendments; (3) the opposing party would be unduly prejudiced by the amendment; or (4) the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962) (reversed because district court should have permitted plaintiff to amend after case dismissed on pleading deficiency); *see, e.g., Maldonado v. Dominguez*, 137 F.3d 1, 11 (1st Cir. 1998) (revision of complaint would be futile). If the court decides an issue was tried by consent, it must treat the issue as if it had been pleaded. *Winger v. Winger*, 82 F.3d 140, 144 (7th Cir. 1996).

In this case, the trial at the trial court level was held March 31, 2003. On April 7, 2003, Respondent filed their motion for leave to file trial amendment to the first amended disciplinary petition, with objection by Petitioner filed April 8,

2003. On April 11, 2003, the Court granted Respondent's request for the trial amendment. On June 30, 2003, the court conducted the punishment phase of the bifurcated trial. On July 21, 2003 Respondent filed its motion for leave to file second trial amendment to the first amended disciplinary petition, with objection brief by Petitioner filed July 25, 2003. The Court granted Respondent's request for the second trial amendment July 16, 2003. On September 8, 2003, the court signed orders that on March 30, 2003 it held trial and on June 30 conducted the punishment phase, with the following conclusions in its judgment: regarding the Rasor complaint, Petitioner violated Texas Disciplinary Rules of Professional Conduct Rule 1.14(b); regarding the Bender complaint, Petitioner violated Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(8); regarding the Schattman complaint, Petitioner violated Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(3). Based upon those conclusions, the trial court determined that Petitioner's conduct violated Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(1) defined by Texas Rules of Disciplinary procedure Rule 1.06Q.

Petitioner was not fairly put on notice as to the theory of the case, and/or evidence intended to be used to assert said theory not reflected in the trial amendment. Respondent had the obligation of a heightened pleading requirement. See Texas Rules of Disciplinary procedure Rule 3.01, *Swierkiewicz*, 534 U.S. at 513. As factually pleaded in the first amended disciplinary petition, Petitioner demonstrated allegations concerning the April 2000 deposit, receipt, and distribution of funds were false. Respondent, prior to trial, did not file a trial amendment or at the time of trial did not motion, request or offer a trial amendment.

Texas courts have rulings on the amendment of pleadings before the close of evidence as follows. Some

evidence came in without objection, but the issue was not developed. See *Whatley v. City of Dallas,* 758 S.W.2d 301, 307 (Tex.App.--Dallas 1988, writ denied). Plaintiff ahead of time had knowledge of the facts and added new and separate cause of action. See *Sosa v. City of Corpus Christi,* 739 S.W.2d 397, 400 (Tex.App.--Corpus Christi 1987, no writ). Adding new theory after the close of evidence. See *White v. Sullins,* 917 S.W.2d 158, 161 (Tex.App.--Beaumont 1996, writ denied); *Tuck v. Tuck,* 509 S.W.2d 656, 657-58 (Tex.App.--Austin 1974, writ ref'd n.r.e.). Adding cross-action and additional defense of unavoidable accident during the preparation of the charge. See *Leong v. Wright,* 478 S.W.2d 839, 846-47 (Tex.App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.). Adding new theory of the case after close of the evidence. See *Burroughs Corp. v. Farmers Dairies,* 538 S.W.2d 809, 811 (Tex.App.--El Paso 1976, writ ref d n.r.e.). Adding substantive matter in response to a defense known to party since pretrial discovery. *Miller v. Wal-Mart Stores, Inc.,* 918 S.W.2d 658, 666 (Tex.App.--Amarillo 1996, writ denied).

The key points to the above cases in which trial amendments were refused are: (1) Some evidence came in without objection, but the issue was not developed; (2) Plaintiff ahead of time had knowledge of the facts and added new and separate cause of action; and (3) Adding new theory after the close of evidence

In trial, Respondent failed to request a trial amendment and the court did not order such. Respondent did not seek a motion to amend the pleadings and the pretrial order should be made as soon as Respondent realized the amendment was necessary. The trial court granted the motion for leave to amend too late. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); *American Fed. Group, Ltd. v. Rothenberg, 136* F.3d 897, 905 (2d Cir. 1998); *Orix Credit Alliance v. Taylor Mach.*

Works, Inc., 125 F.3d 468, 480-81 (7th Cir. 1997); *Douglas*, 50 F.3d at 1236; *Consolidated Data Terminals v. Applied Digital Data Sys. Inc.*, 708 F.2d 385, 396 (9th Cir. 1983); see, e.g., *Johnson*, 629 F.2d at 294-95 (court denied amendment sought on 43rd day of trial because it would force defendants to prepare mid-trial defense on new issue).

Respondent did not include the issue in the pretrial order, did not raise the issue at the pretrial conference, and did not object to the court's final pretrial order. See *Ideal Elec. Sec.*, 81 F.3d at 245-47; *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 998-99 (1st Cir. 1990). In fact, Respondent waited until seven days after trial before filing its motion for leave to file trial amendment.

The granting of Respondent's request for their trial amendments by the trial court was a violation of Petitioner's rights to due process. Some evidence came in without objection, but the issue was not developed. See *Whatley v. City of Dallas,* 758 S.W.2d 301, 307 (Tex.App.--Dallas 1988, writ denied). Respondent ahead of time had knowledge of the facts ahead of time and added new and separate cause of action. See *Sosa v. City of Corpus Christi,* 739 S.W.2d 397, 400 (Tex.App.--Corpus Christi 1987, no writ). Respondent added a new theory after the close of evidence. See *White v. Sullins,* 917 S.W.2d 158, 161 (Tex.App.--Beaumont 1996, writ denied); *Tuck v. Tuck,* 509 S.W.2d 656, 657-58 (Tex.App.--Austin 1974, writ ref'd n.r.e.), *Burroughs Corp. v. Farmers Dairies,* 538 S.W.2d 809, 811 (Tex.App.--El Paso 1976, writ ref d n.r.e.).

The issue was not tried by consent. The evidence Respondent claimed in support of the unpleaded issue was introduced in support of another issue that was included in the pleadings. *Modern Elec.*, 81 F.3d at 247; *Douglas*, 50 F.3d at 1236. Petitioner objected to evidence that was introduced in

support of the unpleaded issue on the grounds that the issue was not contained in the pleadings. See *Rios v. Bigler*, 67 F.3d 1543, 1549 (10th Cir. 1995); *DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 917 (1st Cir. 1992).

The amendment caused Petitioner substantial prejudice because Petitioner did not have the opportunity to introduce evidence on that issue. *Fisher*, 70 F.3d at 1449; *Douglas*, 50 F.3d at 1236. The courts often consider prejudice as a factor when a party attempts to add an issue during or after the trial. See *Foman*, 371 U.S. at 182, 83 S.Ct. at 230; *Fisher*, 70 F.3d at 1449; *Douglas*, 50 F.3d at 1236; *Jones & Jones*, 22 F.3d at 400. Prejudice by a late amendment is inevitable if the other party does not have a fair opportunity to defend against the issue. See *Douglas*, 50 F.3d at 1236. The amendment caused substantial prejudice to Petitioner's ability to defend the suit because the amendment changed the theory and tactics of the suit. *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969).

Respondent did not first move to have the judgment set aside (when the motion to amend is made after trial). *Sparrow v. Heller*, 116 F.3d 204, 205 (7th Cir. 1997). Respondent delayed in making the motion when it had an opportunity to present the amendment earlier (when the motion to amend is made after trial). *Diersen v. Chicago Car Exch.*, 110 F.3d 481, 489 (7th Cir. 1997) (noting that prolonging litigation by permitting postjudgment amendment would impair public interest in prompt resolution of legal disputes). The amendment added an element of surprise. E.g., *Orix Credit Alliance*, 125 F.3d at 480-81 (new counts added prospect of punitive damages, which might have caused defendant to take different measures to protect himself from additional liability). Respondent was guilty of bad faith or dilatory motive in requesting the amendment, or had not cured pleading deficiencies. *Foman*, 371 U.S. at 182, 83 S.Ct. at 230.

Consistent with *Dowling v. United States*, 493 U.S. 342, 353 (1990), the trial judge was obliged to protect Petitioner's due process rights at three different stages: at the pre-admission stage, during the trial when the evidence is introduced, and in the final charge to the jury. Because these three procedural safeguards form the basis for the Supreme Court's decision that the admission of other-misconduct evidence for *non*-propensity purposes may be able to survive a due process challenge.

In *In Re Ruffalo*, 390 U.S. 544 (1968), the state court proceedings, originally charged petitioner with 12 counts of misconduct. At the following hearings, both Orlando and petitioner testified regarding charges 4 and 5. Immediately after hearing this testimony, the Board, on the third day of hearings, added Charge 13 against petitioner. Charge 13 for which petitioner stands disbarred was not in the original charges made against him, added only after both he and Orlando had testified. Thereafter, no additional evidence against petitioner relating to charge 13 was taken. Counsel for the county bar association said that as far as they were concerned, the only facts that they would introduce in support of charge 13 were the statements that petitioner and Mike Orlando made in court.

In this case before the bar Petitioner in his appeal raised the issue to the appellate court that the trial court improperly granted trial amendments and in doing so, through the amendments, made a substantive change and altered the nature of the trial itself. Petitioner also raised the issue before the appellate court that he did not have a chance to introduce evidence in response to the amendment and that, the trial court abused its discretion in permitting the amendments. The appellate court affirmed the trial court's judgment yet refused to address the issues Petitioner raised regarding the trial amendments.

On appeal, the court reviews the trial court's rulings on amendments under the abuse of discretion standard. *Ohio Med. Prods., Inc. v. Suber*, 758 S.W.2d 870, 872 (Tex. App.--Houston [14th Dist.] 1988, writ denied).

If the amendment made a substantive change and altered the nature of the trial itself, the trial court had the discretion to deny leave to amend. *Chapin,* 844 S.W.2d at 665; see, e.g., *Hardin v. Hardin,* 597 S.W.2d 347, 349-50 (Tex.1980) (court had discretion to deny amendment offered on day of trial to add affirmative defenses).

If the nonmovant does not have a chance to introduce evidence in response to the amendment, the court abuses its discretion in permitting the amendment. *See Douglas v. Owens,* 50 F.3d 1226, 1236-37 (3d Cir. 1995). The appellate court will reverse the district court's ruling on a motion to amend pleadings only if the district court abused its discretion. *Orix Credit Alliance,* 125 F.3d at 480; *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1064 (8th Cir. 1997); *Triad Elec. & Controls, Inc. v. Power Sys. Eng'g, Inc.,* 117 F.3d 180, 192 (5th Cir. 1997); *Atchinson v. District of Columbia,* 73 F.3d 418, 426 (D.C. Cir. 1996); *Security Ins. Co. v. Kevin Tucker* & Assocs., 64 F.3d 1001, 1008 (6th Cir. 1995).

In *In Re Ruffalo* this Court held that the lack of notice to petitioner deprived petitioner of procedural due process and that a lawyer charged with misconduct in a bar proceeding is entitled to procedural due process, which includes fair notice of the charge.

Permitting trial amendments was an absence of fair notice and the precise nature of the charges violated Petitioner of substantive, civil procedural, and procedural due process under the Fifth and Fourteenth Amendments of The United

States Constitution, Article I, Sec. 19 of the Texas Constitution, Code Construction Act, Government Code Chapter 311, Texas Rules of Civil Procedure Rules 262, 269(a), 270, 275, 300, and 301, Texas Rules of Disciplinary Procedure Rules 3.01, 3.08, 3.09, 3.10, and the *Preamble: Scope* of the Texas Disciplinary Rules of Professional Conduct.

D. Void-for-Vagueness Construction of Texas Disciplinary Rules of Professional Conduct Rules 4.01(a) and 8.04(a) Violated Due Process

In this case, the absence of the definition of "attorney" in the Texas Disciplinary Rules of Professional Conduct Procedure is unconstitutionally overbroad and vague in that it leaves the term "attorney" to the imagination whether the term refers to an attorney acting as an attorney, or also includes an a person acting solely in his personal capacity, who also happens to be an attorney. The rules do not distinguish the capacity of the person making the speech.

Rules 4.01 and 8.04(a)(8) of the Texas' Rules of Disciplinary Procedure violated Petitioner's rights to freedom of speech under the First Amendment of the United States Constitution and Article I, Sec. 8 of the Texas Constitution.

This point is made in *William Chu v. Chong Hui Hong*, 2005 LEXIS 8767 (Tex. App.–Fort Worth) (unreported case); Cause No. 2-04-279-CV. In this case, the court in delivering its opinion said the following in reference to Tex. Disciplinary R. Prof'l Conduct Rule 8.04(a) (1), (2), and (3): The State Bar's rules of professional conduct forbid **a lawyer** to commit any act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness **as a lawyer**, or to engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation.

In *Chu* the court in its choice of wording "a lawyer ... as a lawyer" suggests that the intention was the capacity. Based on the holding of the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), Texas Disciplinary Rules of Professional Conduct Rules 4.01 and 8.04(a) are facially invalid because they violate Petitioner's Fourteenth Amendment rights to equal protection and due process of law. And, because the statute is facially unconstitutional, Petitioner cannot be found to violate Texas Disciplinary Rules of Professional Conduct Rules 4.01 and 8.04(a). In the alternative, Texas Disciplinary Rules of Professional Conduct Rules 4.01 and 8.04(a) are unconstitutional because they are both overbroad and void for vagueness.

Respondent's Rules provision regarding the lawful speech of Petitioner is unconstitutional on its face and as applied because it is vague and overbroad, impermissibly restricts lawful expression and is a prior restraint. Respondent's policies constitute an impermissible viewpoint-based and content-based restriction of constitutionally protected lawful expression, and grants Respondent unfettered discretion in the restriction of lawful expression.

The policies and conduct of Respondent constitutes a violation of the First Amendment of the United States Constitution and Article I, Sec. 8 of the Texas Constitution. Respondent's policies are vague. Respondent's policies prohibiting lawful speech fail to adequately advise, notify, or inform Petitioner threatened with disciplinary action for violation of this provision of Petitioner's capacity.

Respondent's policies restricting speech fail to adequately advise Petitioner of his capacity that is subject to discipline under them or of the obligations they create; they are

unconstitutionally vague on their face; and, in violation of the due process guarantee of the Fourteenth Amendment.

In *CSC v. Letter Carriers*, 413 U.S. 548 (1973), some individual federal employees, an employees' union, and certain local Democratic and Republican political committees filed an action challenging as unconstitutional on its face the prohibition in 9 (a) of the Hatch Act, 5 U.S.C. 7324 (a) (2), against federal employees' taking "an active part in political management or in political campaigns." The court said "[T]he Act permits the individual employee to "express his opinion on political subjects and candidates."

Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(8) is facially invalid because it violates Petitioner's rights to lawful free speech under the First Amendment of the United States Constitution and Article I, Sec. 8 of the Texas Constitution. The application of Rule 8.04(a)(8) against Petitioner grants Respondent unfettered discretion in the restriction of lawful expression. And, because the statute is facially unconstitutional, Petitioner cannot be found to violate Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(8). In the alternative, Texas Disciplinary Rules of Professional Conduct Rule 8.04(a)(8) is unconstitutional because it is both overbroad and void for vagueness.

REASONS FOR GRANTING THE PETITION

A. The 5th District and Supreme Court of Texas' Decision Directly Conflicts With A Decision Of The United States Supreme Court

1. The 5th District and Supreme Court of Texas' decision conflicts squarely with the United States Supreme Court's decision in *In re Ruffalo,* 390 U.S. 544 (1968). *In re*

Ruffalo, the Supreme Court held that the lack of notice to petitioner deprived petitioner of procedural due process and that a lawyer charged with misconduct in a bar proceeding is entitled to procedural due process, which includes fair notice of the charge.

2. The material facts of *In re Ruffalo* and the case at bar are identical. Ruffalo was accused of soliciting personal injury clients with claims under the Federal Employers Liability Act. He allegedly hired a railroad employee to investigate claims against the railroad by which the investigator was employed. After the hearings ended, the disciplinary agency found that Ruffalo should be suspended indefinitely, not because of any unethical solicitation, but because his employment of the railroad employee created a conflict of interest. That charge was not part of the formal charging document.

Ruffalo challenged the disciplinary commission's decision. The Supreme Court held that the procedure violated Ruffalo's due process rights because he was not given notice of the conflict of interest of charge before the proceedings commenced.

3. The 5th District and the State Supreme Court of Texas declined to follow *In Re Ruffalo* even though it recognized the holding of the United States Supreme Court. The 5th District refused to address the issues of the heightened pleading requirements of Rule 3.01 and the use of trial amendments. The Supreme Court of Texas did not take the bill of review. Petitioner presented the issues of the heightened pleading requirements of Rule 3.01 and the use of trial amendments before both these courts.

4. The conflict between the 5th District and the State Supreme Court of Texas and this Court is significant and requires immediate resolution by this Court. First, the result of the conflict between these court is that the proper rule of law to be applied in Texas is unknown. If a challenge to heightened pleading requirements of Rule 3.01 and the use of trial amendments is brought in state court, there will be one answer—if the same challenge is brought in federal court, there will be a different answer. This is an intolerable situation. When there is a conflict between different circuits or different state courts, the law within each circuit or state is settled; the question on certiorari is the need for national uniformity. In the Texas Courts and the United States Supreme Court, the courts have issued two completely irreconcilable decisions. The conflict between the Texas courts and the United States Supreme Court imposes a state of confusion that can only be settled by a decision of this Court.

5. Second, this case involves the validity of a provision of the Texas Rules of Disciplinary Procedure. Texas Rules of Disciplinary Procedure Rule 8.04(a)(8) grants unfettered discretion in the restriction of lawful expression and imposes a stricter separation of church and state than the Free Expression Clause of the First Amendment of the United States Constitution.. This Court is the appropriate tribunal to decides whether a state statutory provision runs afoul of the United States Constitution.

The conflict between the Texas courts and the United States Supreme Court is the result of the Texas courts failure to properly apply this Court's precedent. This Court has decided a consistent line of cases holding regarding due process and statutory construction.

6. Instead of following these well-established precedents, the Texas courts tangled up its analysis with other lines of decisions that do not apply. The Court's free speech and due process cases deal with laws that actually impact the majority of society—as opposed to cases that involve the use of due process and free expression with attorneys.

B. The Question Presented Has Significance Beyond The State Of Texas

1. This case also has national significance beyond the intolerable conflict between the Texas courts and the United States Supreme Court. First, like Texas, all states have similar laws regarding attorneys.

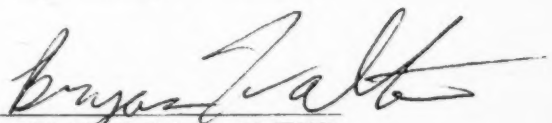
The implication of the Texas Courts' ruling of is that the heightened pleading requirements of Rule 3.01 and the use of trial amendments and statute construction does not violate the Fifth and Fourteenth Amendments of The United States Constitution, Article I, Sec. 19 of the Texas Constitution, Code Construction Act, Government Code Chapter 311, Texas Rules of Civil Procedure Rules 262, 269(a), 270, 275, 300, and 301, Texas Rules of Disciplinary Procedure Rules 3.01, 3.08, 3.09, 3.10, and the *Preamble: Scope* of the Texas Disciplinary Rules of Professional Conduct. This result is inconsistent with this court decisions that apply their specific constitutional prohibitions regarding due process and free expression regarding attorneys.

Thus, the Texas courts' decision is likely to have a wide impact beyond the State of Texas. Given the national scope of this restriction, this Court should grant review to settle the issue.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 2, 2005

Supreme Court, U.S.
FILED
051241 MAR 2 - 2006
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN LEE WALTER,

Petitioner,

v.

COMMISSION FOR LAWYER DISCIPLINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF APPEALS OF THE FIFTH DISTRICT OF TEXAS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

Orders

A. State Trial Court Orders

1. Judgment of Partially Probated Suspension (September 8, 2003)

CAUSE NO. 401-1212-02

COMMISSION FOR LAWYER DISCIPLINE	§	IN THE DISTRICT COURT OF
	§	
Petitioner,	§	
	§	
v.	§	COLLIN COUNTY,
	§	TEXAS
BRYAN L. WALTER	§	
	§	
Respondent	§	401ST JUDICIAL
	§	DISTRICT

JUDGMENT OF PARTIALLY PROBATED SUSPENSION

On the 30th day of March 2003, the above-styled and numbered cause was called for trial. Petitioner, the Commission for Lawyer Discipline, appeared by and through its attorney of record, Stephen A. Moyik, and announced ready. Respondent, Bryan L. Walter, appeared in person and by and through his attorney of record, Steven L. Lee, and announced ready. A jury having been waived by both parties, all maters of fact, as well as matters of law, were submitted to the Court for determination. On the 30th day of June 2003, the Court having determined that Respondent had committed Professional

Misconduct as set forth below, heard evidence to determine the appropriate measure of discipline to impose upon Respondent for such Professional Misconduct.

The Court, having read the pleadings and papers on file herein, having received testimony and evidence, and having heard the arguments of counsel, is of the opinion that the Petitioner is entitled to judgment on its First Amended Disciplinary Petition, as amended by its Second Trial Amendment, as set forth herein.

Regarding the Rasor Complaint, the Court concludes that Respondent has violated the following Texas Disciplinary Rules of Professional Conduct: Rule 1.03(a) [a lawyer shall keep a client reasonably informed about the status of a matter] and Rule 1.14(b) [upon receiving funds in which a client has an interest, a lawyer shall promptly deliver to the client any funds that the client is entitled to receive].

Regarding the Bender Complaint, the Court concludes that Respondent has violated the following Texas Disciplinary Rules of Professional Conduct: Rule 1.03(a) [a lawyer shall keep a client reasonably informed about the status of a matter] and Rule 8.04(a)(8) [a lawyer shall not fail to timely furnish to the Chief Disciplinary Counsel's Office or to a district grievance committee a response as required by the Texas Rules of Disciplinary Procedure].

Regarding the Schattman Complaint, the Court concludes that Respondent has violated the following Texas Disciplinary Rules of Professional Conduct: Rule 8.04(a)(3) [a lawyer shall not engage in conduct that involves dishonesty, fraud, deceit or misrepresentation].

Such conduct constitutes Professional Misconduct in violation of Rule 8.04(a)(1), Texas Disciplinary Rules of Professional

Conduct, and as defined by Section 1.06Q, Texas Rules of Disciplinary Procedure. As to such acts of misconduct, the Court finds that the appropriate discipline is suspension from the practice of law in the State of Texas for a period of three (3) years with the first two (2) months to be active suspension and the remaining thirty-four (34) months of such suspension to be probated upon terms and conditions to be hereinafter set forth.

It is accordingly ORDERED, ADJUDGED, and DECREED that the Respondent BRYAN L. WALTER, State Bar Card No. 20811230, be suspended from the practice of law in Texas for a period of three (3) years beginning October 1, 2003, and ending September 30, 2006. Respondent shall be placed on active suspension from the practice of law for the period from October 1, 2003 to November 30, 2003.

It is further ORDERED, ADJUDGED, and DECREED that the remainder of Respondent's suspension shall be probated from December 1, 2003 to September 30, 2006, during which time Respondent shall be entitled to practice law in the State of Texas subject to the following terms and conditions:

1. Respondent shall not violate any term of this Judgment, whether during the period of active suspension or during the period of probation;

2. Respondent shall not violate any of the provisions of the Texas Disciplinary Rules of Professional Conduct nor any provision of the State Bar Rules;

3. Respondent shall not violate the penal laws of the State of Texas, the United States or any other state, other than minor traffic laws;

4. Respondent shall maintain a current status regarding membership fees in accordance with Article III of the State Bar Rules;

5. Respondent shall comply with Minimum Continuing Legal Education (MCLE) requirements in accordance with Article III of the State Bar Rules, and, in addition to the above MCLE requirements, shall satisfactorily complete an additional 8 hours in Legal Ethics prior to the expiration of this period of probation. Respondent shall provide such written waivers of confidentiality regarding his State Bar MCLE Department records as are necessary to allow the Office of Chief Disciplinary Counsel to verify Respondent's compliance with this requirement;

6. Respondent shall comply with the Interest on Lawyers Trust Account requirements in accordance with Article XI of the State Bar Rules;

7. Respondent shall keep the State Bar Membership Department notified of his current business and home addresses and telephone numbers, and shall immediately notify the State Bar Membership Department and the Dallas Regional Office of Chief Disciplinary Counsel, 3710 Rawlins, Suite 800, Dallas, Texas 75219, of any change in his addresses and telephone numbers;

8. Respondent shall participate in the Dallas Professionalism Enhancement Program (PEP) for the period and to the extent prescribed by the State Bar District 6 PEP Committee;

9. Respondent shall fully cooperate with the Office of Chief Disciplinary Counsel in its efforts to monitor compliance with the terms of this Judgment and in any investigations of further allegations of professional misconduct that may arise during

this period of probation, by timely filing written responses to requests for information from the Office of Chief Disciplinary Counsel or any District Grievance Committee;

10. Respondent shall undergo evaluation by a psychiatrist or licensed consulting psychologist at this own expense, and complete such course of treatment or therapy as is prescribed by such psychiatrist or psychologist for anger management. Respondent shall obtain from the psychiatrist or psychologist providing any treatment or therapy a statement or report indicating the level of Respondent's participation and cooperation in the course of such treatment or therapy; Respondent shall provide a copy of the statement or report to the Dallas Regional Office of Chief Disciplinary Counsel, 3710 Rawlins, Suite 800, Dallas, Texas 75219 prior to the expiration of this period of probation; and

11. Respondent shall, not later than December 1, 2004, make payments to the Office of Chief Disciplinary Counsel by cashier's check or money order in the amounts of $3,000.00 in attorney's fees and $3,035.53 in expenses associated with this proceeding. All attorney's fees and expenses ordered herein are imposed upon Respondent as part of the disciplinary sanction pursuant to Section 1.06T, Texas Rules of Disciplinary Procedure, and intended by the parties to be non-dischargable in bankruptcy. In the event any amount of attorney's fees or expenses is not paid as specified in this Judgment of Partially Probated Suspension, all past due amounts shall bear interest in the amount of ten percent (10%) per annum until paid and the State Bar of Texas shall have all writs and other post-judgment remedies against Respondent in order to collect all unpaid amounts.

In the event that Respondent should violate any of the foregoing terms or conditions of probation, the Court shall

revoke such probation and impose on Respondent an active suspension from the practice of law for a period of thirty-four (34) months commencing on or after the date of revocation in accordance with the following procedures:

1. Upon the receipt of information which shows just cause to believe that Respondent has violated any term or condition of his probation, any grievance committee of the State Bar of Texas having received such information or the Office of the Chief Disciplinary Counsel of the State Bar of Texas shall file with the Court a written Motion to Revoke Probation, briefly describing the acts and conduct that gave rise to the alleged violation of a term or condition of probation.

2. A copy of such motion shall be served on Respondent pursuant to Rule 21a, Texas Rules of Civil Procedure, at Respondent's last address shown on the membership rolls of the State Bar of Texas.

3. The Court shall conduct an evidentary hearing within thirty (30) days of the date Respondent is served with a copy of such motion, at which hearing the Petitioner shall bear the burden of proving the violation to the Court under the Texas Rules of Evidence by a preponderance of the evidence.

4. The Court shall decide, without the aid of jury, whether the Respondent has violated any term or condition of probation.

It is further ORDERED that during the term of active suspension herein ordered from October 1, 2003, through November 30, 2003, as well as during any additional term of active suspension that may be imposed upon Respondent by reason of the entry of an order by the Court revoking Respondent's probation, Respondent, BRYAN L. WALTER, shall be prohibited, except to the extent permitted by a federal

court or federal administrative body, from practicing law in Texas, holding himself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services except those already accrued before the commencement of the suspension, appearing as counsel for another in any proceeding in any Texas court or before any administrative body which requires those appearing in a representative capacity to be licensed to practice law, or holding himself out to others or using his name in any manner in conjunction with the words "attorney," "counselor," "counselor at law," or "lawyer."

It is further ORDERED that Respondent, BRYAN L. WALTER, on or before October 1, 2003, shall immediately notify each of his current, active clients in writing of this suspension. In addition to such notification, as regard current, active clients, Respondent shall comply with Rule 13.01 of the Texas Rules of Disciplinary Procedure by either referring such active client matters to another licensed Texas attorney with the consent of each such client or taking the applicable, alternative steps set forth in Rule 13.01 which include returning all papers and property of the client, notifying any courts or agencies in which matters are pending of Respondent's suspension, and notifying opposing counsel of Respondent's suspension. Additionally, Respondent shall, on or before November 1, 2003, file an affidavit with the district clerk under this cause stating his compliance with Rule 13.01 or, to the extent such compliance was not possible, stating the due diligence used in such matters in the attempt to comply with Rule 13.01. Respondent shall mail a certified copy of said affidavit to the Office of Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

It is further ORDERED that Respondent, BRYAN L. WALTER, shall, on or before October 1, 2003, surrender his

Texas law license and permanent State Bar card to the Office of Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, for transmittal to the clerk of the Supreme Court of Texas.

it is further ORDERED that the Clerk of this Court shall forward a certified copy of Petitioner's First Amended Disciplinary Petition on file herein, along with a copy of this Judgment, to each the Clerk of the Supreme Court of Texas, Supreme Court Building, P.O. Box 12248, Austin, Texas 78711, and to the Office of the Chief Disciplinary Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

It is further ORDERED that this suspension shall be made a matter of public record and published in the Texas Bar Journal, as well as a newspaper of general circulation in the county of Respondent's residence of office.

It is further ORDERED that all costs of court herein incurred shall be taxed against the Respondent, BRYAN L. WALTER, for which the Clerk may have his execution if they are not timely paid.

Signed this 8th day of September-2003.

/s Roy T. Sparkman
Hon. Roy T. Sparkman
JUDGE PRESIDING

APPROVED AS TO FORM:

/s Steven L. Lee
STEVEN L. LEE
Attorney for Respondent

APPROVED AS TO FORM AND SUBSTANCE:

/s Stephen A. Moyik
STEPHEN A. MOYIK
Attorney for Petitioner

2. Agreed Order of Stay Pending Appeal (September 8, 2003)

CAUSE NO. 401-1212-02

COMMISSION FOR LAWYER DISCIPLINE	§	IN THE DISTRICT COURT OF
Petitioner,	§	
v.	§	COLLIN COUNTY, TEXAS
BRYAN L. WALTER	§	
Respondent	§	401ST JUDICIAL DISTRICT

AGREED ORDER
OF STAY PENDING APPEAL

ON THIS, the 18th day of September, 2003, came on to be considered Respondent's Unopposed Motion for Stay Pending Appeal. The Court, having read the Motion, considered the matter, and in recognition that the relief requested is not opposed by the non-movant, enters the following Order.

It is hereby ORDERED, ADJUDGED AND DECREED that the Judgment of this Court, signed on the 8th day of September, 2003, should be stayed pending appeal.

It is further ORDERED, ADJUDGED AND DECREED that should the judgment not be reversed, the currently existing Judgment shall become effective on the sixtieth (60th) day after the appeal has been terminated, for any reasons, including but not limited to voluntary dismissal by the Respondent/Appellant, involuntary dismissal by an appellate court, withdrawal of the appeal with or without the agreement of the Appellee, or exhaustion of appeals.

It is further ORDERED that for the purposes of calculation of the commencement of the time period after the termination of appeals, the counting of days shall begin on the day after the date shown on the dispositive document, such as an Order, Mandate, Judgment, or Agreement of the Parties.

It is further ORDERED that should the judgment in this case not be reversed, the commencement of Respondent's active suspension shall begin on the effective date of the judgment as calculated in accordance with this Stay Order and all operative dates for any other action, deadline, or other event set forth in the current judgment, shall be determined by adding the appropriate number of days to the first date upon which the judgment becomes effective so as to maintain the durations of time and/or deadlines set forth in the original judgment from the effective date of the judgment.

It is further ORDERED that should the judgment in this case not be reversed, the parties shall sign and file with the District Clerk of Collin County a Rule 11 agreement setting forth specifically the new effective date of the judgment and the specific dates for performance of any acts set forth in the current judgment and, should Respondent and/or his counsel fail to agree with Petitioner or refused to sign a Rule 11 agreement, the Petitioner shall file a statement so stating the failure of agreement and setting forth the specific dates for all